

100KETEII E AADVABIQINBI

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)
RETIRED
EDWARD F. KENEHAN
CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U.S. AMBASSADOR (ret.)
OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH
WRITER'S DIRECT

RECEIVED

SEP 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

812-0474

kersting@fhh-telcomlaw.com

September 24, 1998

BY HAND DELIVERY

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

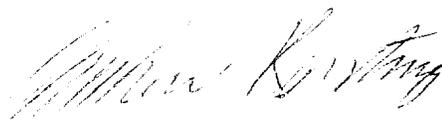
Re: Application for Review
MM Docket Nos. 97-26 and 97-91;
(Detroit, Howe and Jacksboro, Texas,
and Antlers and Hugo, Oklahoma, et al.)

Dear Ms. Salas:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc., are an original and four copies of its Application for Review, filed in the above-referenced proceeding in response to the *Report and Order*, DA 98-1650 (released August 21, 1998). This Application for Review is being timely filed in accordance with Sections 1.115(d) and 1.4(b) of the Commission's rules. 47 CFR §§1.115(d), 1.4(b). See 63 *Fed. Reg.* 45182 (1998)

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for Metro Broadcasters-Texas, Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

SEP 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-26
Table of Allotments,	)	RM-8968
FM Broadcast Stations,	)	RM-9089
(Detroit, Howe and Jacksboro, Texas,	)	RM-9090
Antlers and Hugo, Oklahoma))	

In the Matter of)	
)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-91
Table of Allotments,	)	RM-8854
FM Broadcast Stations,	)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and)	
Mineral Wells, Texas))	

To: The Commission

APPLICATION FOR REVIEW

METRO BROADCASTERS-TEXAS, INC.

Harry C. Martin, Esquire
 Andrew S. Kersting, Esquire
 FLETCHER, HEALD & HILDRETH, P.L.C.
 1300 N. Seventeenth Street, 11th Floor
 Arlington, Virginia 22209
 (703) 812-0400

September 24, 1998

TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. Introduction	1
A. Background	1
B. The <i>R&O</i>	3
II. Questions Presented	5
III. The Allocations Branch Erred in Dismissing Metro's Counterproposal and Refusing to Accept Its Curative Reimbursement Commitment	5
A. Metro's Curative Reimbursement Commitment	6
B. Heftel's Proposal is Defective Because It Failed to Protect the Reference Coordinates for the Existing Channel 240C1 Allotment at Mineral Wells	9
C. The Allocations Branch Failed to Follow the Commission's Rules and Failed to Address the Significant Legal Issues Raised by Metro	12
D. The Allocations Branch Erred in Treating the Snyder Application as a Counterproposal in this Proceeding	13
E. Heftel's Defective Proposal Has Not Been Cured by the Heftel/Snyder Settlement Proposal	14
F. Snyder's Application for Review Inaccurately Depicts the Relationship Between Heftel's Rulemaking Petition and the Snyder Application	16
IV. Heftel's Proposal Should Be Denied Because the Community of Robinson Is Not Entitled to a First Local Service Preference	17
V. Conclusion	24

SUMMARY

In this allotment proceeding, the Allocations Branch ("Branch") made a series of errors which resulted in the grant of a defective technical proposal. As demonstrated herein, in evaluating the mutually exclusive allotment proposals, the Branch failed to follow the Commission's longstanding allotment rules and neglected to address the significant legal issues raised by Metro Broadcasters-Texas, Inc. ("Metro"). As a result, the *Report and Order* is arbitrary and capricious, and inconsistent with Commission precedent and established Commission policy.

As Metro has demonstrated throughout this proceeding, the pending application of Jerry Snyder and Associates, Inc., filed November 25, 1996 (File No. BPH-961125GI) ("Snyder Application"), constitutes a continuing expression of interest in the Channel 240C1 allotment at Mineral Wells, Texas, and was filed long before the initial comment deadline in this proceeding. The Petition for Rulemaking filed by Heftel Broadcasting Corporation ("Heftel") failed to protect the reference coordinates of the existing Channel 240C1 allotment at Mineral Wells, as well as the coordinates specified in the Snyder Application. Thus, because Heftel's proposal was not technically correct and substantially complete as of the comment deadline in this proceeding, the Branch erred in concluding that acceptance of Metro's curative reimbursement commitment would "prejudice" Heftel, whose proposal was defective from the outset.

In addition, the Branch erred in treating the Snyder Application as a counterproposal in this proceeding and in accepting the Heftel/Snyder settlement proposal. Indeed, the parties' settlement proposal constituted nothing more than a belated attempt to cure the fatal, technical deficiency in Heftel's original proposal, which could not be cured after the initial comment deadline. Moreover, Snyder's Application for Review and Heftel's Petition for Partial Reconsideration, both of which

were filed September 21, 1998, establish that the parties' settlement proposal has been terminated and that Snyder intends to continue to prosecute the Snyder Application.

The Branch also erred in concluding that the community of Robinson, Texas, warrants a first local service preference. The record establishes that Robinson is interdependent with the Waco Urbanized Area, and, thus, that the proposed substitution and reallocation of Channel 300A at Robinson would not result in a preferential arrangement of allotments. Consequently, Heftel's interrelated proposal to substitute Channel 300C1 for Channel 300C2 at Gainesville, Texas, and reallocate Channel 300C1 to Lewisville, Texas, also should be denied because it is dependent upon the proposed substitution and reallocation at Robinson

For all of these reasons, the Branch's *R&O* should be reversed and Heftel's rulemaking petition should be denied.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-26
Table of Allotments,	)	RM-8968
FM Broadcast Stations,	)	RM-9089
(Detroit, Howe and Jacksboro, Texas,	)	RM-9090
Antlers and Hugo, Oklahoma))	
)	
In the Matter of)	
)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-91
Table of Allotments,	)	RM-8854
FM Broadcast Stations,	)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and)	
Mineral Wells, Texas))	
To: The Commission		

APPLICATION FOR REVIEW

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel and pursuant to Section 1.115 of the Commission's rules, hereby requests Commission review of the Chief, Allocations Branch's *Report and Order*, DA 98-1650 (released August 21, 1998) ("*R&O*"), in the above-captioned proceeding. In support of this request, the following is stated:

I. Introduction.

A. Background.

In response to a petition for rulemaking filed by Great Plains Radiocasting ("Great Plains"), the Allocations Branch ("Branch") issued a *Notice of Proposed Rule Making* in MM Docket No. 97-

26, 12 FCC Rcd 1810 (1997), proposing the allotment of Channel 294C2 to Detroit, Texas, as its first local service. In response to that *Notice*, Metro filed a counterproposal proposing the substitution of Channel 237C2 for Channel 237C3 at Howe, Texas, and modification of its Station KHYI license to specify operation on Channel 237C2. In order to accommodate this upgrade, Metro also proposed the substitution of channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and modification of the license of Station KITX, Hugo, to specify operation on Channel 294C2.

On March 17, 1997, K95.5, Inc. ("K95.5"), licensee of Station KITX, Hugo, Oklahoma, filed a counterproposal proposing the allotment of Channel 294C2 to Antlers, Oklahoma, as a first local service.

In a separate proceeding, and at the request of Heftel Broadcasting Corporation ("Heftel"),¹ the Branch issued a *Notice of Proposed Rule Making and Order to Show Cause* in MM Docket No. 97-91, 12 FCC Rcd 3059 (1997), which set forth two allotment proposals. First, Heftel proposed the substitution of Channel 300C1 for Channel 300C2 at Gainesville, the reallocation of Channel 300C1 to Lewisville, Texas, and the modification of its Station KECS construction permit to specify operation on Channel 300C1 at Lewisville. Heftel also proposed the substitution of Channel 300A for Channel 300C1 at Corsicana, the reallocation of Channel 300A to Robinson, Texas, and the modification of its Station KICI-FM license to specify operation on Channel 300A at Robinson. As the Branch noted in its *R&O*, the Channel 300A substitution at Robinson is necessary to accommodate the Channel 300C1 upgrade at Lewisville. In order to accommodate both of Heftel's

¹ Heftel is the parent of both KECS-FM License Corp., permittee of Station KECS, Channel 300C2, Gainesville, Texas, and KICI-FM License Corp., licensee of Station KDXX-FM (formerly KICI-FM), Channel 300C1, Corsicana, Texas. To avoid confusion, Metro will continue to refer to Station KDXX-FM herein by its former call letters, KICI-FM.

proposed reallocations, Heftel also proposed the substitution of Channel 237A for Channel 299A at Jacksboro, Texas, and the modification of Station KJKB's construction permit at Jacksboro to specify operation on Channel 237A. *R&O* at ¶3.

Heftel's proposal to substitute Channel 237A at Jacksboro in MM Docket No. 97-91 is mutually exclusive with Metro's counterproposal to upgrade Station KHYI, Howe, to Channel 237C2 in MM Docket No. 97-26. Thus, because there are no alternative channels available for either Howe or Jacksboro, the Branch was forced to consolidate the two rulemaking proceedings. *See R&O* at ¶5.

B. The R&O.

With respect to the proposals in MM Docket No. 97-26 ("Detroit proceeding"), the Branch allotted Channel 294C2 to Detroit² as a first local service.³ The Branch also allotted alternate Channel 222C2 to Antlers, Oklahoma, as a first local service.⁴ *R&O* at ¶6.

With respect to MM Docket No. 97-91 ("Lewisville proceeding"), the Branch granted both of Heftel's reallocation proposals. The Branch substituted Channel 300C1 for Channel 300C2 at

² Unless otherwise indicated, all communities referenced herein are located in the state of Texas.

³ On June 30, 1998, Great Plains filed a "Withdrawal of Expression of Interest of Great Plains Radiocasting," stating that it no longer had an interest in the proposed Channel 294C2 facility at Detroit. The Branch did not acknowledge the withdrawal of Great Plains' interest in its *R&O*. Accordingly, on September 3, 1998, Great Plains filed a "Request for Immediate Issuance of Erratum," requesting that the Branch delete the allotment of Channel 294C2 at Detroit due to the absence of an expression of interest for this allotment.

⁴ As demonstrated in Metro's Reply Comments, Channels 222A, 262A, or 222C2 were available alternative channels that could be allotted to Antlers, Oklahoma, without conflicting with the proposals to allot a Class C2 facility at Detroit. *See* Metro Reply Comments, filed April 1, 1997, pp. 2-4.

Gainesville, reallocated Channel 300C1 to Lewisville, and modified the KECS construction permit to operate on Channel 300C1 at Lewisville. The Branch also substituted Channel 300A for Channel 300C1 at Corsicana, reallocated Channel 300A to Robinson, and modified the license of Station KICI-FM to specify operation on Channel 300A at Robinson. *R&O* at ¶8. The Branch noted that the adoption of these proposals would provide both Lewisville and Robinson with a first local service, and that the reallocation of Channel 300A to Robinson warranted a first local service preference even though Station KICI-FM would provide a 70 dBu signal to 70% of the Waco Urbanized Area. *Id.*

In adopting Heftel's proposals, the Branch dismissed Metro's counterproposal for a Channel 237C2 upgrade at Howe. The Branch noted that Metro's counterproposal would require Station KITX, Hugo, Oklahoma, to move from Channel 238C2 to Channel 294C2, but that Metro did not state its willingness to reimburse the licensee of Station KITX for changing its channel in either its rulemaking comments or reply comments. Instead, Metro filed supplemental comments on May 2, 1997, in which it clarified its willingness to reimburse \$95.5 for the costs of changing its channel. The Branch determined, however, that it could not accept Metro's curative reimbursement commitment because, in its view, acceptance of Metro's reimbursement pledge would prejudice Heftel's mutually exclusive proposals. *R&O* at ¶6.

The Branch also stated that, even if it were to accept Metro's counterproposal, it would not have preferred the proposed upgrade at Howe over the Lewisville and Robinson reallocation proposals under the FM allotment criteria.⁵ According to the Branch, Heftel's proposals would provide first local services to Lewisville and Robinson, which would result in a net service gain to

⁵ The FM allotment priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

approximately 3,248,422 persons, while Metro's proposal to upgrade KHYI at Howe would have served an additional 137,974 persons. *R&O* at ¶7.

II. Questions Presented for Review.

The following questions are presented for review:

1. Whether the Allocations Branch erred in dismissing Metro's counterproposal for a Channel 237C2 upgrade at Howe, Texas;
2. Whether the Allocations Branch erred in concluding that acceptance of Metro's curative reimbursement commitment would prejudice Heftel's mutually exclusive reallocation proposals;
3. Whether the Allocations Branch erred in treating an application filed by Jerry Snyder and Associates, Inc. ("Snyder") as a counterproposal in this proceeding;
4. Whether the Allocations Branch erred in accepting Snyder's and Heftel's settlement proposal; and
5. Whether the Allocations Branch erred in concluding that Robinson, Texas, is sufficiently independent of the Waco Urbanized Area to warrant a first local service preference.

As demonstrated below, the Branch's *R&O* is arbitrary and capricious, and inconsistent with FCC case precedent and established Commission policy. Moreover, the Branch failed to address the significant legal issues raised by Metro, and did not provide a reasoned basis for its decision.

III. The Allocations Branch Erred in Dismissing Metro's Counterproposal and Refusing to Accept Its Curative Reimbursement Commitment.

The Branch stated that it could not accept Metro's "late-filed submission" to cure its counterproposal because acceptance of its reimbursement commitment would, according to the Branch, prejudice Heftel's mutually exclusive proposals.⁶ As demonstrated below, however, the

⁶ *R&O* at ¶6, citing *Scottsboro, Alabama, Trenton, Georgia and Signal Mountain, Tennessee*, 6 FCC Rcd 6111 (1991); *Boalsburg, Pennsylvania*, 7 FCC Rcd 7653 (1992).

Branch erred in dismissing Metro's counterproposal and in refusing to accept its curative reimbursement commitment because Heftel's proposal was defective as of the initial comment deadline in this proceeding.⁷ Indeed, the question of whether acceptance of Metro's curative reimbursement commitment would prejudice Heftel is inextricably related to the significant legal issues that Metro has raised in this proceeding. The Branch erred by failing to address those issues, and, at the same time, making the conclusory and wholly unsupported determination that acceptance of Metro's minor curative submission would prejudice Heftel's mutually exclusive proposals.

A. Metro's Curative Reimbursement Commitment.

Metro filed comments and reply comments in the Detroit proceeding on March 17 and April 1, 1997, respectively. In each of those pleadings, however, Metro omitted making any reference to the fact that it intended to reimburse K95.5, licensee of Station KITX, Hugo, Oklahoma, for the reasonable expenses it would incur in implementing the proposed substitution of Channel 294C2 for Channel 238C2 at Hugo.⁸ As a result, Metro filed "Supplemental Comments" on May 2, 1997, in which it clarified that it would reimburse K95.5 for its "reasonable and prudent costs associated with implementing the requested frequency change."⁹

⁷ As will be shown below, Heftel's proposal also was technically defective at the time the *Notice of Proposed Rule Making and Order to Show Cause* was released on March 14, 1997, because Snyder filed an application for the Channel 240C1 allotment at Mineral Wells on November 25, 1996 (*see* File No. BPH-961125GI).

⁸ It was Metro's understanding that a rulemaking proponent, whose proposal would require another station to change channels, was required, as a matter of law, to reimburse stations such as KITX for their reasonable and prudent expenses incurred in implementing the proposed channel switch. *See generally Circleville, Ohio*, 8 FCC 2d 159, 163 (1967).

⁹ Metro's Supplemental Comments, p. 1.

In *Boalsburg, Pennsylvania*,¹⁰ the Commission permitted a counterproponent, who neglected to provide a reimbursement commitment in its counterproposal, to cure this minor deficiency by providing such a statement in its reply comments. In doing so, the Commission distinguished this situation from one where no attempt is made to provide a late-filed reimbursement pledge:

Although Pro Marketing failed to include a commitment to reimburse the licensees [of the affected stations] for their expenses in changing channels, this failure was cured by the inclusion of such a statement in Pro Marketing's reply comments. Brockway Broadcasters never filed a similar curative statement. While we require that all counterproposals be technically and procedurally correct when filed, . . . *we do not absolutely prohibit minor curative submissions. . . .* We see no reason to reject a counterproposal for failure to include a reimbursement commitment when that failure is cured and acceptance of the counterproposal would not require the denial of another proposal before us in the proceeding and *no prejudice would result to the licensees entitled to reimbursement.*

Id. at 7654, n.7 (emphasis added).¹¹

Like the counterproponent in *Boalsburg*, Metro cured the minor procedural deficiency in its counterproposal by clarifying its intent to reimburse K95.5 for the reasonable and prudent costs it would incur in implementing the requested frequency change. As demonstrated below, although Metro filed its curative reimbursement statement one month after the date for filing reply comments, acceptance of its reimbursement commitment would not materially delay the resolution of this proceeding, nor would it result in the denial of another proposal in this proceeding or prejudice any licensee entitled to reimbursement. Indeed, the Branch expressly acknowledged the completeness and status of Metro's counterproposal by accepting it for filing in an FCC Public Notice on May 15,

¹⁰ *Boalsburg, Clearfield, et al., Pennsylvania*, 7 FCC Rcd 7653 (Chief, Policy and Rules Div. 1992), *rev. dismissed*, 10 FCC Rcd 12264 (1995)

¹¹ Case citations have been omitted.

1997.¹² Moreover, the Branch made no finding in the *R&O* that “the licensees entitled to reimbursement” were prejudiced by Metro’s curative reimbursement pledge.

Although Great Plains proposed the allotment of Channel 294C2 to Detroit,¹³ Metro’s counterproposal demonstrated that Channel 238 can be allotted to Detroit in lieu of Channel 294C2 as either a Class C2, C3 or A facility, and would not conflict with Metro’s proposed substitution of Channel 237C2 for Channel 237C3 at Howe.¹⁴

Similarly, acceptance of Metro’s curative submission would not deprive K95.5 of the allotment of an additional channel at Antlers, Oklahoma. As demonstrated in Metro’s reply comments, in addition to the existing vacant allotment for Channel 284A at Antlers, there are two alternative channels available for allotment to Antlers (one of which is fully-spaced as a Class C2 facility) that would not conflict with either the proposal set forth in the *Detroit Notice of Proposed Rule Making* or Metro’s counterproposal.¹⁵

Furthermore, acceptance of Metro’s reimbursement commitment would not result in any cognizable prejudice to K95.5. K95.5 does not make any claim that acceptance of Metro’s curative submission either would prejudice its substantive allotment proposal or cause it any greater harm than if the reimbursement commitment had been included in Metro’s March 17, 1997,

¹² See Public Notice, Report No. 2197 (released May 15, 1997).

¹³ As stated above, Great Plains has withdrawn its expression of interest in the proposed Channel 294C2 allotment at Detroit. See Great Plains’ “Withdrawal of Expression of Interest of Great Plains Radiocasting,” filed June 30, 1998.

¹⁴ See Metro’s Comments and Counterproposal, filed March 17, 1997, pp. 2-3.

¹⁵ As demonstrated therein, Channels 222A, 262A, or 222C2 may be allotted to Antlers without conflicting with the proposals to allot a Class C2 facility at Detroit. See Metro’s Reply Comments, filed April 1, 1997, pp. 2-4.

counterproposal. Indeed, the only prejudice that K95.5 claims would result from acceptance of Metro's curative reimbursement commitment is that Station KITX would have to modify its existing operation to operate on Channel 294C2, rather than its existing Channel 237C2.¹⁶ K95.5's mere preference to avoid having KITX change channels does not constitute the requisite "prejudice" under *Boalsburg*, and should not preclude the acceptance of Metro's curative reimbursement commitment. Therefore, the only issue concerning the acceptability of Metro's minor curative submission is whether it would prejudice Heftel's mutually exclusive proposals.¹⁷

B. Heftel's Proposal is Defective Because It Failed to Protect the Reference Coordinates for the Existing Channel 240C1 Allotment at Mineral Wells.

As stated in the *R&C*, the substitution and reallocation of Channel 300C1 to Lewisville is dependent upon the substitution and reallocation of Channel 300A to Robinson. The reallocation of Channel 300A to Robinson requires the substitution of Channel 237A for Channel 299A at

¹⁶ See K95.5 Opposition to Motion for Leave to File Supplemental Comments, filed May 15, 1997, p. 4. As demonstrated in Metro's reply comments, the fact K95.5 has foregone the opportunity of filing a first-come/first-serve application for the vacant Channel 284A allotment at Antlers for five years, and only now seeks to bring a new radio service to that community, strongly suggests that K95.5's counterproposal was filed solely for the anti-competitive purpose of precluding the allotment of a Class C2 facility at Detroit. Hugo is located approximately only 30 miles northwest of Detroit. See *Rand McNally Road Atlas*, p. 94 (1997). As demonstrated in the engineering exhibit attached to Metro's reply comments, there would be a substantial overlap of the city-grade contours of Station KITX and a Class C2 facility at Detroit operating with maximum facilities. See Metro's Reply Comments, filed April 1, 1997, pp. 2-5, and Engineering Statement, p. 2 and Figure 5 thereto.

¹⁷ As stated above, Heftel is not a licensee/permittee entitled to reimbursement as a result of Metro's counterproposal. Thus, the question of whether Metro's curative reimbursement pledge prejudiced Heftel should not have been considered by the Branch because *Boalsburg* provides such protection only to "licensees entitled to reimbursement." *Boalsburg*, 7 FCC Rcd at 7654, n. 7.

Jacksboro, which, in turn, requires the downgrade of Channel 240C1 at Mineral Wells to Channel 240C3. *R&O* at ¶3.

Section 73.207(a) of the Commission's rules provides that the Commission will not accept petitions to amend the FM Table of Allotments unless the reference coordinates specified in the petition meet all of the minimum distance separation requirements. 47 CFR §73.207(a). Channel 237A cannot be substituted for Channel 299A at Jacksboro in compliance with the minimum distance separation requirements. As demonstrated in Exhibit 1 to Heftel's Petition for Rulemaking, filed July 26, 1996, the proposed substitution of Channel 237A at Jacksboro is 15.3 kilometers short-spaced to the reference coordinates for Channel 240C1 allotment at Mineral Wells. Although the previous construction permit for the Channel 240C1 facility at Mineral Wells expired some time ago,¹⁸ Heftel is nevertheless required to protect the Channel 240C1 allotment. *See, e.g., Eldorado and Lawton, Oklahoma*, 5 FCC Rcd 618 (Chief, Allocations Branch 1990) (subsequent history omitted). Indeed, the Commission does not delete a channel or downgrade an existing allotment where, as here, there is an expression of interest demonstrated by the filing of an application by the initial comment deadline, even where a construction permit has been forfeited and cancelled. *See Martin, Tiptonville and Trenton, Tennessee*, DA 98-1799 (Chief, Allocations Branch, released

¹⁸ As explained in Metro's Comments and Counterproposal, filed May 5, 1997, Snyder's efforts to construct its Class C1 facilities for Station KYXS, Mineral Wells, were frustrated by the death of the property owner of Snyder's proposed transmitter site, and the fact that the property owner's widow and son were unwilling to make the property available to Snyder while the property was in the deceased's estate. Although Snyder's efforts to find an alternative site were unavailing, after the estate sold the land to a local municipal water district, Snyder entered into an arrangement with the water district to use a portion of the land for its transmitter site. On November 25, 1996 (prior to the issuance of the *Notice of Proposed Rule Making and Order to Show Cause* in the Lewisville proceeding), Snyder filed a construction permit application (BPH-961125GI) for its new Class C1 facility at Mineral Wells, and that application remains pending. *See* Snyder's Comments, filed May 5, 1997, and accompanying declaration of Jerry Snyder.

September 11, 1998) (Branch denied proposal to downgrade existing allotment from Class C3 to Class A where the petitioner was the only party to express an interest in a Class A allotment, and other parties filed expressions of interest for only a Class C3 allotment); *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580, n.3 (Chief, Allocations Branch, 1994) (NPRM) (subsequent history omitted).¹⁹

It is well settled that proposals are required to be "technically correct and substantially complete" at the time they are filed.²⁰ In this case, Snyder filed an application for the Channel 240C1 facility at Mineral Wells on November 25, 1996 (File No. BPH-961125GI) ("Snyder Application"). The *Notice of Proposed Rulemaking and Order to Show Cause* in the Lewisville proceeding established an initial comment deadline of May 5, 1997. 12 FCC Rcd 3059, 3063 (1997). Thus, because Snyder expressed an interest in the Channel 240C1 allotment at Mineral Wells by filing the Snyder Application long before the comment deadline and Heftel failed to protect the reference coordinates of both that allotment and the Snyder Application in accordance with Sections 73.207 and 73.208 of the Commission's rules, Heftel's proposal -- which is dependent upon the downgrade

¹⁹ See also *Martin and Tiptonville, Tennessee*, 11 FCC Rcd 12695 (Chief, Allocations Branch 1996); *Calhoun City, Mississippi*, 11 FCC Rcd 7660 (Chief, Allocations Branch 1996); *Greenfield, and Stockton, Missouri*, 10 FCC Rcd 5481 (Chief, Allocations Branch 1995) (NPRM); *Woodville Mississippi and Clayton, Louisiana*, 9 FCC Rcd 2769 (Chief, Allocations Branch 1994).

²⁰ *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090, 2093 (Chief, Policy and Rules Division 1997) (rejected a counterproposal as not being technically correct and substantially complete when filed because it was short-spaced to the licensed site of another station); *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181, 13182 (Chief, Allocations Branch 1997) (same); *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406, n.3 (Chief, Allocations Branch 1997) (a counterproposal was found not be technically correct and substantially complete when filed because it was 0.7 km short-spaced to a transmitter site specified in a pending application (and subsequent construction permit) of another station).

of the Channel 240C1 allotment at Mineral Wells to a Class C3 facility -- was not technically correct and substantially complete as of the initial comment deadline. Therefore, consistent with Commission precedent, Hefel's proposal should have been dismissed and given no consideration in this proceeding. *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090; *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181; *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406.

C. The Allocations Branch Failed to Follow the Commission's Rules and Failed to Address the Significant Legal Issues Raised by Metro.

The D.C. Circuit has made abundantly clear that:

. . . [A]n agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, [citation omitted] for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters, Ltd. v. FCC, 781 F.2d 946 at 950-51 (D.C. Cir. 1986). It is equally well established that the Commission has a duty to address significant issues that are raised by parties in a rulemaking proceeding.²¹

In reviewing the record in this proceeding as well as the *R&O*, it is apparent that the Branch was determined to grant Hefel's proposals, which would provide first local services to two communities and result in a net service gain of approximately 3,248,422 persons.²² Nevertheless,

²¹ See *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1354-55 (D.C. Cir. 1988); *American Telephone and Telegraph Company v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

²² See *R&O* at ¶7.

the Branch's desire to achieve the perceived public interest benefits from Heftel's proposals provides no justification for the substantial deviation from the Commission's longstanding allotment rules and established Commission policy. *See Reuters Ltd. v FCC*, 781 F.2d 946. Indeed, when Heftel's proposals are analyzed pursuant to the Commission's allotment rules, it is clear that Heftel's proposal is technically deficient. The Branch's failure to follow the Commission's rules and address the significant legal issues raised by Metro was arbitrary and capricious, inconsistent with Commission precedent and established Commission policy, and necessarily led the Branch to summarily dispose of Metro's substantive legal arguments (and timely counterproposal) through the procedural means of rejecting its curative reimbursement commitment. Instead, Metro's curative reimbursement pledge should have been accepted because such acceptance would not have prejudiced any party entitled to reimbursement, nor would it have prejudiced Heftel's already-defective proposal, which was not entitled to consideration.

D. The Allocations Branch Erred in Treating the Snyder Application as a Counterproposal in this Proceeding.

On January 28, 1998, the Commission released a public notice stating that the Snyder Application was being considered as a counterproposal in this proceeding.²³ The Commission issued the *Public Notice* despite the facts that (i) the Channel 240C1 allotment at Mineral Wells has existed since April 20, 1992;²⁴ (ii) the Snyder Application, which was filed prior to the initial comment deadline in this proceeding, constitutes an expression of interest in that facility; and (iii) Heftel's rulemaking petition failed to protect the reference coordinates of the Channel 240C1 allotment in

²³ *See Public Notice*, Report No. 2251 (released January 28, 1998) ("*Public Notice*").

²⁴ *Mineral Wells and Winters, Texas*, 7 FCC Rcd 1791 (Chief, Allocations Branch 1992).

accordance with the Commission's rules. Thus, because Heftel's proposal was not "technically correct and substantially complete" as of the initial comment deadline, the Branch erred in treating the Snyder Application as a counterproposal and by failing to dismiss Heftel's proposal.²⁵

E. Heftel's Defective Proposal Has Not Been Cured by the Heftel/Snyder Settlement Proposal.

As demonstrated above, Commission precedent makes clear that the Branch erred in considering the Snyder Application as a counterproposal in this proceeding. Consequently, the Branch also erred in accepting the reply comments filed by Heftel and Snyder on February 12, 1998, because they constituted nothing more than a belated attempt to cure the fatal, technical deficiency in Heftel's original proposal, which cannot be cured after the initial comment deadline. *See, e.g., Frederiksted*, 12 FCC Rcd at 2407 n.3. The Commission's issuance of the *Public Notice*, whether inadvertent or not, cannot extend the date by which Heftel's proposal was required to be technically correct and substantially complete. Indeed, acceptance of Heftel's late-filed settlement proposal would undermine the integrity of the Commission's processes and prejudice Metro's timely-filed, acceptable proposal. *See Amor Family Broadcasting Group*, 918 F.2d 960, 963 (D.C. Cir. 1990). Nevertheless, even assuming, *arguendo*, the Commission were to conclude that the Branch acted within its discretion in entertaining the late-filed Heftel/Snyder settlement proposal, Heftel's defective proposal has not been cured because the Branch effectively denied the proposed settlement

²⁵ *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090; *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181; *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406.

by limiting the amount of compensation that Snyder could receive under the parties' "Compensation Agreement."²⁶

The *R&O* makes clear that neither the Lewisville nor the Robinson proposed reallocation may commence program tests until Snyder has been granted a construction permit for a Class C1 facility that is fully-spaced to the Channel 237A reallocation at Jacksboro. *R&O* at ¶¶15-16. The record in this proceeding establishes that the sole motivation for Snyder's willingness to dismiss the Snyder Application and move to a reference site some 26.7 miles southwest of Mineral Wells -- a site which Heftel and Snyder readily admit is "less desirable" and "less commercially viable"²⁷ -- is the substantial monetary payment that Heftel agreed to provide Snyder under the parties' Compensation Agreement. However, in Snyder's Application for Review, filed September 21, 1998, Snyder expressly denounced its settlement proposal with Heftel, stating that it intends to continue to prosecute the Snyder Application for the Channel 240C1 facility at Mineral Wells.²⁸ Specifically, Snyder stated that the parties' Compensation Agreement is "dead," the Branch's refusal to permit Heftel to compensate Snyder in an amount greater than its expenses voided the agreement, and, as a result, Snyder no longer is obligated to move to a new transmitter site or refrain from prosecuting

²⁶ In reviewing the settlement proposal pursuant to *Amendment of Section 1.420 and 73.3528 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), the Branch stated that it could not approve the settlement to the extent it would permit Snyder to receive an amount in excess of its "legitimate and prudent expenses." *R&O* at ¶13.

²⁷ Joint Opposition to Motion to Dismiss or to Strike Joint Reply Comments and Reply Comments, filed March 11, 1998, by Heftel and Snyder, p. 4; Joint Reply Comments of Heftel and Snyder, filed February 12, 1998, p. 3.

²⁸ Snyder Application for Review, p. 5. *See also* Heftel's Petition for Partial Reconsideration, filed September 21, 1998, p. 5 (stating that the Heftel/Snyder Compensation Agreement has been terminated).

the Snyder Application.²⁹ *Id.* at 5-6. Therefore, Snyder's Application for Review establishes the following: (i) the Heftel/Snyder settlement proposal has been terminated; (ii) Heftel's defective proposal has not been cured; and (iii) contrary to the Branch's finding in the *R&O*, acceptance of Metro's curative reimbursement commitment will not result in any prejudice to Heftel.

F. Snyder's Application for Review Inaccurately Depicts the Relationship Between Heftel's Rulemaking Petition and the Snyder Application.

In its September 21, 1998, Application for Review, Snyder makes the following statement:

. . . [T]he FCC gave the unauthorized Heftel Counterproposal priority status over Snyder's application by announcing that the FCC would treat Snyder's application as a counterproposal, rather than an application filed prior to the N.P.R.M.

Snyder Application for Review, p. 3. Snyder also claims that "the FCC rewarded Heftel by giving its untimely counterproposal cut-off preference to Snyder's application contrary to all law and precedent." *Id.* at 9.

Despite Snyder's characterization of the relationship between Heftel's rulemaking petition and the Snyder Application, the Branch did not give Heftel's rulemaking petition "priority status" or a "cut-off preference" *vis-a-vis* the Snyder Application. As stated above, the Branch erred by failing to recognize that the Snyder Application constituted an expression of interest in the Channel 240C1 allotment at Mineral Wells. Indeed, the fundamental issue in this proceeding is not whether

²⁹ Snyder also noted that the Compensation Agreement between the parties will expire by its own terms if it has not been approved by the Commission, and such approval has become a "final order," by November 12, 1998. *See* Snyder Application for Review, p. 6. Because a decision by the full Commission in this proceeding cannot become "final" by the November 12th deadline, the settlement proposal between Heftel and Snyder will not be effectuated for this additional reason.

Heftel's rulemaking petition was filed prior to the Snyder Application, or *visa-versa*.³⁰ Instead, the relevant facts are as follows: (i) in MM Docket No. 90-555,³¹ the Commission made a public interest determination that the public interest would be served by allotting Channel 240C1 to Mineral Wells; (ii) Snyder expressed an interest in the Channel 240C1 allotment by filing an application for that facility long before the initial comment deadline in this proceeding; and (iii) Heftel's rulemaking petition failed to protect the reference coordinates of both the Channel 240C1 allotment and the Snyder Application in accordance with the Commission's rules and established policy. Therefore, for the reasons stated above, Heftel's proposals were defective as of the initial comment deadline in this proceeding, and its rulemaking petition should be denied.

IV. Heftel's Proposal Should Be Denied Because the Community of Robinson Is Not Entitled to a First Local Service Preference.³²

In determining whether a suburban community warrants a first local service preference, the Commission has established the following three criteria: (i) signal population coverage, (ii) the size of the suburban community relative to the adjacent city, and (iii) the independence-interdependence between the suburban community and the central city. See *RKO General, Inc. (KFRC)*, 5 FCC Rcd

³⁰ In its Application for Review, Snyder argues at great length that the Branch acted improperly in considering Heftel's rulemaking petition because, rather than being considered separately on its merits, Snyder believes it should have been considered only as an untimely counterproposal in MM Docket No. 96-10, *Farmersville, Texas et al.*, 12 FCC Rcd 4099 (Chief, Allocations Branch 1997).

³¹ *Mineral Wells and Winters, Texas*, 7 FCC Rcd 1791 (Chief, Allocations Branch 1992).

³² As stated above, the Channel 300A substitution at Robinson is necessary to accommodate the Channel 300C1 upgrade at Lewisville. *R&O* at ¶3. Thus, if the proposed reallocation of Channel 300A from Corsicana to Robinson does not serve the public interest, Heftel's primary proposal of substituting Channel 300C1 for Channel 300C2 at Gainesville, and reallocation of Channel 300C1 to Lewisville, must be denied.

3222, 3223 (1990), citing *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988) (“*Tuck*”). Under the first criterion of signal population coverage, Heftel’s proposed substitution of Channel 300A to Robinson would provide a city-grade signal to 70% of the Waco Urbanized Area.³³ *R&O* at ¶8. Robinson also is less than one-fourteenth the size of Waco,³⁴ and immediately adjacent to the larger central city.³⁵ Moreover, a substantial portion of Robinson lies within the Waco Urbanized Area. *Id.* at Figures 1-2. Thus, two of the three criteria set forth in *Tuck* demonstrate that Robinson does not warrant a first local service preference.

The Commission has stated that the independence-interdependence criterion is the “critical consideration” in determining whether a suburban community warrants a first local service preference. *See KFRC*, 5 FCC Rcd at 3223, citing *Tuck*, 3 FCC Rcd at 5378. In evaluating the third criterion, the Commission has held that the showing required depends on the degree to which the size and proximity of the pertinent communities suggest that the community of license is simply an appendage to the large central city.³⁶

³³ In *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352, 10354 (Chief, Allocations Branch, 1995), the Commission stated that it will require stations seeking to move from rural communities to suburban communities located outside, but proximate to, urbanized areas, to make the same showing that the Commission had previously required of stations seeking to move into urbanized areas if they would place a city-grade (70 dBu) signal over 50% or more of the urbanized area. *Id.* at ¶ 11.

³⁴ According to the 1990 U.S. Census, Robinson has a population of 7,111, and the population of Waco is 103,590.

³⁵ *See* Heftel Comments, filed May 5, 1997 (“Heftel Comments”), Attachs. 1 & 2, Figure 1.

³⁶ *KFRC*, 5 FCC Rcd at 3223. The Commission “*presumptively* consider[s] the urbanized area to be the relevant metropolitan area ‘community’ in adjudicatory cases.” *Id.* (emphasis added).

... [T]he required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city. When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a *Huntington* exception. *On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city.*

Tuck, 3 FCC Rcd at 5378 (emphasis added).

As demonstrated above, the great differential in size between Robinson and Waco and the fact the two communities are contiguous are compelling indications of interdependence. *See KFRC*, 5 FCC Rcd at 3223. Thus, in order for Robinson to receive a first local service preference, Heftel must make a strong showing through other evidence that Robinson is independent of Waco. *Id.*

In *Tuck*, the Commission set forth eight factors for assessing the interdependence between the specified community and the central city within an urbanized area.³⁷ With respect to factor 1, most of the residents of Robinson work in Waco.³⁸ Under factor 2, Robinson does not have its own newspaper. In *KFRC*, the Commission found it "significant" that the specified community did not

³⁷ The eight factors are as follows: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. *Tuck*, 3 FCC Rcd at 5378, ¶36

³⁸ Heftel Comments, p. 7 and Attach. 2, Declaration of Jane Gilmore ("Gilmore Declaration"), p. 1.

have its own newspaper. 5 FCC Rcd at 3224. Although Heftel claims there is a weekly insert called "Neighbor", which covers Robinson's local needs and interests, the insert appears in the *Waco Tribune*. These facts demonstrate that Robinson is completely dependent upon Waco for media coverage of its local needs and interests.³⁹

Pursuant to factor 3, Heftel solicited several letters from selected community representatives who view Robinson as being a separate community from Waco.⁴⁰ However, these letters are entirely self-serving and should be accorded diminished weight, especially in light of the substantial evidence demonstrating that Robinson is merely an appendage of Waco. Indeed, Heftel has made no showing that Robinson has any local needs or interests that are separate and independent from those of the Waco Urbanized Area.

Under factor 4, Robinson has its own local government and elected officials. *Id.* at 9.

With respect to factor 5, Robinson does not have its own telephone book or zip code.⁴¹ The telephone numbers of Robinson's businesses and residences are published in Southwestern Bell's Greater Waco telephone book. Although the Robinson Chamber of Commerce apparently published a city telephone directory at one time, it has not been published in ten years. *Id.* and Gilmore

³⁹ In its Comments, Heftel claimed that Robinson had a weekly newspaper, *The Hometown News*, which was published in Waco. Heftel Comments, p. 7. However, this newspaper apparently is no longer in business. See *Editor & Publisher*, p. II-79 (77th ed. 1997).

⁴⁰ See Heftel Comments, p. 7, and Gilmore Declaration, p. 2. Heftel's argument that there are "striking demographic differences between Robinson and Waco" should not be given any consideration under the independence-interdependence criterion. Indeed, there undoubtedly are substantial demographic differences between Chevy Chase, Maryland and the District of Columbia. It cannot be seriously contended, however, that a community such as Chevy Chase is independent of the Washington, D.C. Urbanized Area

⁴¹ Waco has 14 zip codes, including one which also is assigned to Robinson. Heftel Comments, Attach. 2, Gilmore Declaration, p. 2.